IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BETA-BOTHELL CENTER, LLC, a Washington limited liability corporation, Respondent, v. QUALITY FOOD CENTERS, INC., a Washington corporation, n/k/a FRED MEYER STORES, INC., an Ohio corporation, and/or THE KROGER CO., an Ohio corporation, Appellants.	)	NO. 62727-9-I DIVISION ONE UNPUBLISHED OPINION Filed: February 16, 2010

Lau, J. — In this commercial lease dispute, Quality Food Center, Inc., and Beta Bothell Center, LLC, disagree on the meaning of the term "additional" included in a clause that amended the lease term. Because this clause is susceptible to more than one reasonable interpretation and the parties' intent is a question of fact, we reverse summary judgment granted in favor of Beta and remand for further proceedings.

FACTS

Viewed in the light most favorable to QFC, the record shows that in 1976, QFC

signed an agreement to lease (1976 lease) a supermarket space from Western Properties-Bothell Center JV commencing in 1978. Western was a joint venture between Lewis and Richard Brunhaver. Western later assigned the lease to Beta-Bothell Center, a limited liability company consisting of the two Brunhavers.[1] The 1976 lease required QFC to pay monthly base rent of $3,730 and additional rent based on a percentage of yearly gross sales, if sales exceeded a $2,984,000 "breakpoint."[2] It also provided for a 20-year base term and granted QFC two five-year options to renew the lease term.

> 2. TERM.
>
> The term of this Lease shall be for a period of twenty (20) years commencing on the date being the earlier of (a) the expiration of forty-five (45) days after the premises are made available to Tenant for its work . . . or (b) the opening by Tenant of its business from the premises. . . .
>
> Tenant shall have the option, provided it is not then in default under any of the provisions hereof, to extend the term of this Lease, upon the same terms and conditions herein specified, for two (2) additional terms of five (5) years, upon giving Landlord written notice . . . .
>
> It is contemplated by the parties that the supermarket building shall be certified ready for Tenant's work . . . not later than March 1, 1978 and that the lease term shall commence not later than April 15, 1978 . . . .
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> 3. RENT.
>
> 3.1. Minimum Monthly Rent. Tenant shall pay to Landlord as Minimum Monthly Rent for the premises the sum of Three thousand seven hundred thirty Dollars ($3,730.00) per month. . . .
>
> 4. PERCENTAGE RENTAL.
>
> Tenant shall pay to Landlord, in addition to the minimum monthly rental provided under the terms of Paragraph 3 above, an amount which shall be equal to One and one-half percent (1-1/2%) of the excess, if any, of "gross sales," . . . over Two million nine hundred eighty-four thousand Dollars ($2,984,000.00) per calendar year. . . .

(Emphasis added.)

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[1] The record does not disclose when the lease was assigned.

[2] A "breakpoint" is the minimum gross sales a tenant must generate before it is obligated to pay an additional percentage rent on top of a monthly fixed rent.

Then in 1992, QFC remodeled its Bothell store and the parties signed a modified lease (1992 modified lease) that increased the monthly base rent to $12,808, raised the breakpoint to $10,246,400, extended the lease term to 2008,[3] and granted QFC "four (4) additional terms of five (5) years" to renew the lease.

> TERM: Paragraph 2: The term of the lease will be increased to fifteen (15) years commencing from the grand opening of tenant's expanded space.
>
> Tenant shall have the option, provided it is not then in default of any of the provisions hereof, to extend the term of this lease modification, upon the same terms and conditions contained herein, (except rent) for four (4) additional terms of five (5) years, upon giving landlord written notice of the exercise of said option at least one hundred eighty (180) days prior to the expiration of the extended term of this lease.

(Emphasis added.)

In 2002, QFC again sought to remodel its Bothell store and amend the lease. While the parties initially disagreed on the terms, they eventually signed "Amendment No. 2 to Lease" (2002 amendment).

> RECITALS
>
> A. Landlord's predecessor in interest and Tenant entered into a Lease dated August 26, 1976, as modified on July 30, 1992, (the "Lease") for property located at 18921 Bothell Way N.E., City of Bothell, State of Washington (the "Store"), and
>
> B. Tenant is planning a major remodel at the Store and Landlord and Tenant desire to amend the lease to change the percentage rent terms to help Tenant recover some of its remodel costs and to add additional options to renew.
>
> AGREEMENT
>
> NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant hereby agree as follows:
>
> 1. Paragraph 4, Percentage Rent. Effective upon the completion of construction as certified by Tenant's General Contractor, the Percentage Rent breakpoint shall be raised from the existing breakpoint of $10,246,000 to $11,246,000. Tenant will pay Percentage Rent using this formula until Tenant

[3] The new lease term actually began in 1993.

has recaptured all hard construction costs. . . .

2. Paragraph 2, Term is amended to grant Tenant Four (4) additional five (5) year options to renew the lease upon the same terms and conditions, with rent to be mutually negotiated in good faith by the parties.

3. Except as provided herein, all other terms and conditions of the Lease shall remain in full force and effect.

(Emphasis added.)

And in July 2007—less than a year before the 1992 modified lease base term expired—QFC again sought to remodel its Bothell store. The parties then negotiated the terms of the remodel, amendments to the lease, and the rent for the option period commencing in April 2008. Gordon Hom, QFC's manager of real estate and an attorney, discussed the proposed terms with Beta. In a follow-up letter to an August 2007 meeting, Hom stated, "The current Lease term ends on April 13, 2008 and QFC has four (4) options of five (5) years each with the rent to be mutually negotiated in good faith by the parties." And in a September 10, 2007 letter, Hom again stated, "The current Lease term ends on April 13, 2008 and QFC has four (4) options of five (5) years each with the rent to be mutually negotiated in good faith by the parties." Finally, in an October 2, 2007 letter discussing possible amendments to the renewal period rent terms, Hom stated,

2. First option's rent fixed at $10.50 per square foot;
3. Rent for each of the three (3) remaining five (5) year options ~~to increase by ten percent (10%) over the prior option term rent;~~ Rent to be mutually negotiated in good faith.

But on October 9, 2007, Hom sent Beta a letter explaining, "[T]the parties have been incorrectly interpreting the lease . . .":

This letter is notification to Landlord under the above referenced Lease that Tenant is exercising its first of eight options to extend the Lease for an

> additional 5-years. . . .
>
> Following consultation with our counsel, we were informed that the parties have been incorrectly interpreting the Lease concerning the number of options and the method of determining option rent. The Lease Modification grants to Tenant four options of five years each with the option rent to be determined as described in the paragraph above. Similarly, Amendment No. 2 grants four additional options with those option rents "to be mutually negotiated in good faith by the parties."

(Emphasis in original.)

On March 27, 2008, Beta filed a complaint for interpleader and declaratory relief seeking a determination that the 1976 lease and its subsequent amendments granted only four options to renew with rent to be negotiated in good faith, QFC's refusal to negotiate constituted a breach of contract, and seeking damages, costs, and fees. In response, QFC filed an answer and counterclaim for declaratory relief. Both parties cross-moved for summary judgment. The trial court denied QFC's motion and granted Beta's motion, ordering and decreeing that

> 2. QFC has renewed its lease with BETA from the period between April 15, 2008 and April 14, 2013;
>
> 3. QFC has four (4) options to renew the lease after April 14, 2013.
>
> 4. QFC's rent for the four (4) additional terms of five (5) years each beginning on April 13, 2008 shall be mutually negotiated in good faith by the parties. "Good faith" in this context includes its usual meaning and also involves the history of this lease relationship and commercial reasonableness.

This appeal followed.

ANALYSIS

Standard of Review

When reviewing an order granting summary judgment, we engage in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light

most favorable to the nonmoving party. Hearst Commc'ns., Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c); Hearst, 154 Wn.2d at 501. "In the contract interpretation context, '[s]ummary judgment is not proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has two "or more" reasonable but competing meanings.'" Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 83, 60 P.3d 1245 (2003) (quoting Hall v. Custom Craft Fixtures, Inc., 87 Wn. App. 1, 9, 937 P.2d 1143 (1997). We interpret contract terms as a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence or (2) if extrinsic evidence is used, only one reasonable interpretation can be drawn from it. Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996); see also Go2Net, 115 Wn. App. at 85. Generally, the parties' intentions present questions of fact. Paradise Orchards Gen. P'ship v. Fearing, 122 Wn. App. 507, 517, 94 P.3d 372 (2004). Summary judgment is rarely appropriate when extrinsic evidence is needed. Hearst Commc'ns., Inc. v. Seattle Times Co. 120 Wn. App. 784, 791, 86 P.3d 1194 (2004). Even if evidentiary facts are not in dispute, summary judgment is improper where intent is unclear. Wash. Hydroculture, Inc. v. Payne, 96 Wn.2d 322 (1981).

Interpretation of the 2002 Amendment

The crux of the parties' dispute is the meaning of the term "additional" in the 2002 amendment.

> 2. Paragraph 2, Term is amended to grant Tenant Four (4) additional five (5) year options to renew the lease upon the same terms and conditions, with rent to be mutually negotiated in good faith by the parties.

(Emphasis added.)

QFC argues that the 2002 amendment is unambiguous and gives QFC a total of eight five-year options to renew the lease by granting four five-year options to renew "over and above" the four five-year options already granted under the 1992 modified lease. Beta responds that the four five-year options to renew contemplated in the 2002 amendment increased only the base term, not the renewal options granted in the 1992 modified lease. Specifically, Beta maintains that the 2002 amendment replaced entirely the 1992 modified lease's four formula rent renewal periods, with four negotiable rent periods. In short, QFC contends that under the 2002 amendment it is entitled to eight five-year options to renew. And Beta asserts that QFC is limited by this amendment to four five-year options to renew.

"'The touchstone of contract interpretation is the parties' intent.'" Go2Net, 115 Wn. App. at 83–84 (quoting Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)). Washington courts follow the objective manifestation theory of contracts, looking for the parties' intent as objectively manifested rather than their unexpressed subjective intent. Hearst,154 Wn.2d at 503. Thus, a court considers only what the parties wrote, giving words in a contract their ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates a contrary intent. Hearst, 154 Wn.2d at 504. This meaning may be ascertained by reference to standard English dictionaries. Queen City Farms, Inc. v. Cent. Nat'l Ins. Co., 126 Wn.2d 50, 77,

882 P.2d 703, 891 P.2d 718 (1994).

"[E]xtrinsic evidence is admissible to aid in ascertaining the parties' intent 'where the evidence gives meaning to words used in the contract.'" McCausland v. McCausland, 129 Wn. App. 390, 402, 118 P.3d 944 (2005) (quoting Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999)), rev'd on other grounds, 159 P.2d 607, 152 P.3d 1013 (2007). We recently reiterated, "Extrinsic evidence may be considered regardless of whether the contract terms are ambiguous." King v. Rice, 146 Wn. App. 662, 671, 191 P.3d 946 (2008). But extrinsic evidence may not be used "'(1) to establish a party's unilateral or subjective intent as to the meaning of a contract word or term; (2) to show an intention independent of the instrument; or (3) to vary, contradict, or modify the written word.'" McCausland, 129 Wn. App. at 402 (quoting W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 495, 7 P.3d 861 (2000)). "If relevant for determining mutual intent, extrinsic evidence may include (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties." Hearst, 154 Wn.2d at 502.

Here, the 2002 amendment did not define the term "additional." Thus, we first turn to standard dictionaries to find its meaning. Queen City, 126 Wn.2d at 77. Webster's Dictionary defines "add" as "to join, annex, or unite . . . so as to bring about an increase (as in number, size or importance) or so as to form one aggregate." Webster's Third New International Dictionary 24 (1993) (emphasis added). This definition, however, supports reasonable

but competing interpretations. "Additional" could mean, as QFC suggests, to increase the total number of renewal periods. Or it could mean, as Beta argues, to increase the total lease period over the base period to form one aggregate lease period. And in this context, the term "additional" is inherently ambiguous. Therefore, the ordinary usage is inconclusive regarding the parties' intent.

QFC relies heavily on the second recital paragraph in the 2002 amendment, which states,

> B. Tenant is planning a major remodel at the Store and Landlord and Tenant desire to amend the lease to change the percentage rent terms to help Tenant recover some of its remodel costs and to add additional options to renew.

(Emphasis added.) QFC points to this language as evidence that the parties intended to increase the total number of renewal periods. But this recital suffers from the same deficiency as the language in paragraph two quoted above—it is unclear whether the "add additional options" language increases the base term, as Beta contends, or the renewal periods granted in the 1992 modified lease, as QFC maintains. Moreover, the recital alone cannot cure the ambiguity in QFC's favor because recitals provide background to an agreement but do not constitute the agreement itself. See Rains v. Walby, 13 Wn. App. 712, 716, 537 P.2d 833 (1975); see also Contractors Equip. Maint. Co. ex rel. United States v. Bechtel Hanford, Inc., 514 F.3d 899, 905 (9th Cir. 2008) (citing Rains, 13 Wn. App. at 712). And while recitals are one interpretive tool for determining the parties' intent, they are not dispositive. See Rains, 13 Wn. App. at 716 (stating that recitals are indicative "'of the state of mind of the parties.'") (quoting N.

State Constr. Co. v. Robbins, 76 Wn.2d 357, 365, 457 P.2d 187 (1969)). We conclude that the second recital paragraph supports more than one reasonable interpretation of the 2002 amendment.

And extrinsic evidence here, including the parties' past course of dealings, also establishes conflicting but reasonable interpretations of the term "additional." QFC contends that the parties' past interpretation of the lease documents shows that they intended the 2002 amendment to add four renewal periods to the four granted in the 1992 modified lease. In support of this proposition, QFC points out that the 1976 lease granted it two renewal periods that extended the lease term "over and above" the 20-year base term and that the 1992 modified lease granted QFC four renewal terms beyond the 15-year base term. It argues that this past "course of dealing" shows that the parties have always used the term "additional" when they intended to increase the total lease period. Therefore, QFC reasons that paragraph two of the 2002 amendment means that the parties intended to increase rather than replace the total lease period by granting four five-year renewal periods "over and above" the four established by the 1992 modified lease.

But more than one reasonable interpretation is possible here—the parties could have intended that the four renewal periods of the 2002 amendment be "over and above" the base term, not "over and above" the renewal periods of the 1992 modified lease. Beta maintains that this is exactly what the addition of renewal periods meant in both the 1976 lease and the 1992 modified lease. The 1992 modified lease granted "four (4) additional terms of five (5) years" while the 1976 lease provided for "two (2) additional terms of five (5) years."

(Emphasis added.) And as Beta notes, neither party has ever claimed that the 1992 modified lease resulted in a total of six renewal periods. Thus, the question is not whether "additional" means to increase or replace, but rather what is increased—the base term or the renewal periods of the 1992 modified lease. Both of these possibilities are reasonable answers to that question based on the parties' past course of dealings.

The circumstances surrounding the 2002 amendment negotiations also demonstrate conflicting but reasonable interpretations of what the parties intended by use of the term "additional." In February 4, 2002, Lynda Junker, QFC's real estate department representative, sent a "letter of intent" to Beta with proposed terms for the 2002 amendment.

> According to our records, the store lease expires April 14, 2008 with four options to renew at five years each. The following outlines the terms and conditions under which this remodel will be considered:
>
> Options: Tenant shall be granted 4 additional five year options to renew the lease.

However, Beta rejected these terms in an e-mail sent by Richard Brunhaver in response to the letter of intent. Beta countered with a proposal to "grant four (4) additional five (5) year options to renew w/ Base Rent to be negotiated. (After the existing term of April 14, 2008)." The parties signed the 2002 amendment on June 5, 2002. No admissible evidence appears in the record of any other negotiations concerning the renewal periods after this February letter and e-mail exchange and before the parties signed the 2002 amendment.[4] Both parties rely on these statements

[4] QFC points to a February 28, 2008 internal memorandum as evidence that it

surrounding the 2002 amendment negotiations. Yet more than one reasonable interpretation of the parties' intent is possible from this evidence.

Furthermore, the parties' subsequent acts and conduct also support more than one reasonable interpretation of the 2002 amendment. While negotiating terms for the proposed 2007 remodel and lease amendment, Hom wrote in two separate letters to Beta that "[t]he current Lease term ends on April 13, 2008 and QFC has four (4) options of five (5) years each with the rent to be mutually negotiated in good faith by the parties." In a third letter, Hom referred to "[r]ent for each of the three (3) remaining five (5) year options." Beta argues that Hom's statements offer persuasive support for its interpretation of the 2002 amendment.

Nonetheless, these statements do not foreclose other reasonable interpretations. It is undisputed that Hom was not involved in negotiating the 1976 lease, the 1992 modified lease, or the 2002 amendment, and his interpretations of paragraph two were limited to three letters over a three-month period in 2007. And Hom later formally retracted his previous interpretations in an October 9, 2007 letter, stating,

> Following consultation with our counsel, we were informed that the parties have been incorrectly interpreting the Lease concerning the number of options and the method of determining option rent. The Lease Modification grants to Tenant four options of five years each with the option rent to be determined as described in the paragraph above. Similarly, Amendment No. 2 grants four additional options with those option rents "to be mutually negotiated in good faith

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rejected Beta's proposal and that his e-mail should therefore be disregarded as a mere negotiating position. However, there is no evidence that this internal memorandum was ever provided to Beta. As such, it constitutes an unexpressed subjective view of one party's intent and cannot be considered when interpreting the 2002 amendment. See Hearst, 154 Wn.2d at 503–04.

by the parties."

We conclude that reasonable minds could differ about the significance, if any, of Hom's initial and subsequent interpretations of the 2002 amendment.[5] And this extrinsic evidence supports conflicting but reasonable interpretations of the 2002 amendment.

QFC next argues that the subject matter and objective of the 2002 amendment support its interpretation of the disputed clause. Specifically, QFC asserts that the purpose of the 2002 amendment was to help QFC recover its construction costs by increasing the breakpoint and "recogniz[ing] that the four five-year options to renew granted by the [1992 modified lease] did not provide QFC sufficient time to recoup its construction costs." Br. of Appellant at 22. To support this mutual intent theory, QFC asserts, "The Parties agreed to add additional options to renew" and that "[t]hese changes affect Paragraph 2 of the Lease that addresses the Lease term and options to renew." Br. of Appellant at 22. But the "add additional options to renew" language appears in the second recital paragraph of the 2002 amendment. Accordingly, it constitutes neither a part of the agreement nor a "change[] affect[ing] Paragraph 2 of the Lease." See Bechtel, 514 F.3d at 905. Rather, this language provides background to the agreement and does not preclude other reasonable interpretations of the 2002 amendment.

In addition, QFC argues,"[T]he trial court also impermissibly read an entire—and critical—section out of the modified lease." Br. of Appellant at 23. Specifically, QFC

[5] While Beta asserts that Hom's retraction was instigated by QFC counsel not involved in the Bothell lease negotiations, it points to no evidence to support that assertion.

maintains that Beta's interpretation is unreasonable because it would render a portion of the 1992 modified lease ineffective. But this argument does not entitle QFC to judgment as a matter of law because, as Beta correctly notes, QFC did not "offer testimony from any QFC representative involved in the original Lease, 1992 Lease Modification, or 2002 Amendment" and submitted no declarations from "Ms. Junker, Mr. Kjar, or anyone else in the various QFC departments who played a role in the lease negotiations." Br. of Respondent at 12–13. The primary question remains, what did the parties intend when they used the term "additional," an issue that is generally a question of fact. See Fearing, 122 Wn. App. at 517. Furthermore, contract interpretation is a question of law only where it does not depend on the use of extrinsic evidence or the

extrinsic evidence leads to only one reasonable interpretation. Tanner, 128 Wn.2d at 674. Here, both parties have relied extensively on extrinsic evidence—evidence that supports conflicting but reasonable interpretations of the 2002 amendment.[6] We reasoned in Weisert v. Univ. Hosp., 44 Wn. App. 167, 721 P.2d 553 (1986) that where different inferences may be drawn from evidentiary facts as to ultimate facts, summary judgment is not warranted. And in Sanders v. Day, 2 Wn. App. 393, 468 P.2d 452 (1970), we also concluded that summary judgment procedures are not designed to resolve disputes concerning inferences to be drawn from evidence.

[6] Neither QFC nor Beta is entitled to judgment as a matter of law for the reasons explained above.

Attorney Fees

Finally, both parties request an award of attorney fees. Because we reverse the trial court's summary judgment order, we also remand for determination of fees and expenses under RAP 18.1(i).

Conclusion[7]

In sum, summary judgment was improper here because the term "additional" in the 2002 amendment, viewed in light of the entire record, including the amendment as a whole, together with the previous lease documents, the objective of the amendment, and other objective manifestations of the parties' intent, has two or more reasonable but

competing meanings. Accordingly, we reverse summary judgment granted in favor of Beta and remand for further proceedings.

WE CONCUR:

[7] Given our resolution of the summary judgment question, we do not address Beta's estoppel argument.